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Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* 65 LEADING AMERICAN BUSINESSES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are global businesses that recruit at the University of Michigan or similar leading institutions of higher education. Collectively, *amici* have annual revenues well over a trillion dollars and hire thousands of graduates of the University of Michigan and other major public universities. *Amici* have a vital interest in who is admitted to our nation's colleges and universities, and what kind of education and training those students receive. Many of the *amici* have substantial business presences in the state of Michigan, some are headquartered in Michigan, and all have substantial ties to Michigan suppliers and consumers.

The existence of racial and ethnic diversity in institutions of higher education is vital to *amici*'s efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment. As explained in this brief, such a workforce is important to *amici*'s continued success in the global marketplace.

Amici have devoted substantial financial and human resources to create and maintain a diverse workforce. These extensive efforts are part of the very fabric of *amici*'s cultures, are implemented and overseen by senior managers, and are supported at the highest levels. In addition, many of the *amici* pursue a variety of endeavors to support minority students in higher education, including participating in numerous joint initiatives with the University of Michigan and other leading universities with strong academic programs and diverse student

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[1]All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amici* signing this brief or their counsel made a monetary contribution to the preparation or submission of the brief.

bodies, providing under-represented minority students with substantial financial assistance and summer internship opportunities, recruiting and mentoring minority students, extending financial grants, and partnering with university staff and chapters of national minority professional organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Now more than ever, the ability of universities, such as the University of Michigan, to consider all of an applicant's attributes is essential to create the educational environment necessary to best train all their students to succeed. The students of today are this country's corporate and community leaders of the next half-century. For these students to realize their potential as leaders, it is essential that they be educated in an environment where they are exposed to diverse people, ideas, perspectives, and interactions. In the experience of the *amici* businesses, today's global marketplace and the increasing diversity in the American population demand the cross-cultural experience and understanding gained from such an education. Diversity in higher education is therefore a compelling government interest not only because of its positive effects on the educational environment itself, but also because of the crucial role diversity in higher education plays in preparing students to be the leaders this country needs in business, law, and all other pursuits that affect the public interest.

If the University of Michigan is not able to consider all qualities of each applicant to the University, including his or her racial or ethnic background, the University will be hampered in its search for students with the most promise, and its graduates will be less likely to receive an education that gives them "'wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of the*

University of California v. Bakke, 438 U.S. 265, 313 (1978) (opinion of Powell, J.). The University's graduates will therefore be less likely to possess the skills, experience, and wisdom necessary to work with and serve the diverse populations of the United States and the global community. Graduates with such an education are important to the community as a whole, as well as to the *amici* businesses. Accordingly, *amici* seek to add their collective voice in support of the importance of racial, ethnic and other diversity in our leading institutions of higher education, which will better train *all* students and ensure that members of all segments of our society obtain the education and training necessary to enable them to become the community and corporate leaders of tomorrow.

ARGUMENT

THE PURSUIT OF DIVERSITY IN HIGHER EDUCATION IS A COMPELLING STATE INTEREST BECAUSE IT PREPARES ALL STUDENTS TO SUCCEED IN AND ENHANCE THE GLOBAL COMMUNITY.

"[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.). And "[e]thnic diversity . . . is . . . one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.* at 314. Thus, the Court held in *Bakke* that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.).

As Justice Powell recognized in his controlling opinion in *Bakke*, a diverse student body promotes an atmosphere of "speculation, experiment and creation" that is "essential to the quality of higher education." *Id.* at 312 (internal quotations omitted). Moreover, by enriching students' education with a variety of perspectives, experiences, and ideas, a university with a diverse student body equips all of its students with the skills and understanding necessary to succeed in any profession. *Id.* at 314. Those skills include the ability to understand, learn from, and work and build consensus with individuals from different backgrounds and cultures. In finding the attainment of diversity to be a constitutionally permissible state interest, Justice Powell emphasized that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Justice Powell's recognition of the compelling nature of the state's interest in diversity was not limited to undergraduate admissions. "[E]ven at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial." 438 U.S. at 313. Quoting the Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), Justice Powell observed, "'The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.'" *Bakke*, 438 U.S. at 314 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

Justice Powell thus concluded that "the interest of diversity is compelling in the context of a university's admissions program," and that "a university must have wide discretion in making the sensitive judgments as to who should be admitted." *Id.* Justice Powell emphasized that ethnic diversity is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. *Id.* "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

The Court has not addressed since *Bakke* the importance of diversity in the context of higher education. But Members of the Court have recognized the controlling force of Justice Powell's opinion in *Bakke* in the 25 years since the case was decided. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."); *cf. id.* at 313, 314 & n.7 (Stevens, J., dissenting).

In the practical experience of the *amici* businesses, the need for diversity in higher education is indeed compelling. Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from

themselves. *Amici* need the talent and creativity of a workforce that is as diverse as the world around it.

The population of the United States is increasingly defined by its diversity. Two years after *Bakke* was decided, the 1980 census showed that African Americans, Native Americans, Asian Americans and Hispanics constituted 20 percent of the nation's population.[2] By 1999, those groups made up 28 percent of the population of the United States.[3] And by one estimate, these groups will constitute almost half – 47 percent – of the United States' population by the year 2050.[4] The rich variety of ideas, perspectives and experiences to which both non-minority and minority students are exposed in a diverse university setting, and the cross-cultural interactions they experience, are essential to the students' ability to function in and contribute to this increasingly diverse community.

The nature of American business also is changing. Most of the *amici* are truly international companies, and virtually all are becoming so. *Amicus* 3M is a $16.7 billion diversified manufacturing and technology company with operations in more than 60 countries and customers in nearly 200 countries. *Amicus* Boeing makes 70 percent of its commercial airplane

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[2] *See* Population Estimates Program, Population Division, U.S. Census Bureau, *U.S. Population Estimates by Age, Sex, Race, and Hispanic Origin: 1980 to 1999* (rel. April 11, 2000), *available at* http://www.census.gov/population/estimates/nation/natdoc.txt.

[3] *See* Population Estimates Program, Population Div., U.S. Census Bureau, *Population Estimates for States by Race and Hispanic Origin: July 1, 1999* (rel. Aug. 30, 2000), *available at* http://www.census.gov/population/estimates/state/srh/srh99.txt.

[4] Jon Meacham, *The New Face of Race*, NEWSWEEK, Sept. 18, 2000, at 40.

sales to international customers. *Amicus* Procter & Gamble sold a branded product to more than 2.5 billion people across the world last year, yielding more than $40 billion in sales. Similar figures could be provided for many of the *amici*: they operate and compete in a global environment, serving and working with people and cultures of all kinds.

In the experience of *amici*, individuals who have been educated in a diverse setting are more likely to succeed, because they can make valuable contributions to the workforce in several important and concrete ways. First, a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers. Third, a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world. Fourth, individuals who have been educated in a diverse setting are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping. Overall, an educational environment that ensures participation by diverse people, viewpoints and ideas will help produce the most talented workforce.[5]

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[5] *See also, e.g.*, *Diversity: An Imperative For Business Success*, THE CONFERENCE BOARD (1999); Trevor Wilson, *Diversity At Work: The Business Case for Equity* (1996); *Diversity Helps to Deliver Better Business Benefits*, PERSONNEL TODAY, June 18, 2002 ("Four out of five organizations believe there is a direct link between diversity and improved business performance, according to independent research."); *Research Makes a Business Case for Diversity*, FED. HUM. RESOURCES WEEK, Sept. 24, 2001 ("[r]esearch by the National Academy of Public Administration shows that

Amici attest to the validity of these claims through their actions. *Amici* are hiring an increasingly diverse workforce. Drawing upon the diverse student bodies that have existed at schools like the University of Michigan, *amicus* Microsoft has steadily increased its percentage of minority employees, from 16.8% in 1997 to 25.6% of Microsoft's domestic workforce today. Many of the *amici* spend millions of dollars each year to provide financial and other support for minority students to participate in undergraduate and graduate programs at the University of Michigan and other schools. For each of the *amici*, diversity is an increasingly critical component of their business, culture and planning.

There is not, and cannot be, serious debate about the importance of maintaining racial and ethnic diversity in our nation's leading colleges and universities. Whatever methodology is employed to select those who will be afforded the opportunity to obtain the best education and training available in America today, that methodology must operate in such a way that students of all races, cultures and ethnic backgrounds are in fact meaningfully included.

The United States strongly endorses these core propositions. It recognizes that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." Brief for the United States, *Grutter v. Bollinger*, No. 02-241, at 13. The United States argues that "[s]chools may identify and discard facially neutral criteria that, in practice, tend to skew admissions in a

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diverse workforces are more productive"); Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, COMPETITIVENESS REV., Vol. 8, No. 2, at 3-17 (1998).

manner that detracts from educational diversity." *Id.* at 13-14. The thrust of the government's position is that it *is* permissible to take affirmative steps to ensure educational diversity – a goal that itself includes consideration of race. The United States defends particular admissions programs it prefers in Texas, Florida and California explicitly on the ground that those programs allegedly continue to produce, at least in raw numbers, the same racial and ethnic diversity in enrollment. *Id.* at 14-17. Thus, the United States acknowledges, as *amici* urge here, that diversity is important, that universities can reject facially-neutral admissions criteria that do not produce diversity, and that admissions programs can be evaluated and defended based on the levels of racial and ethnic diversity they produce. Finally, in terms of the ultimate importance of diversity in admissions, the actions of the United States also speak loudly: each of our national service academies explicitly considers race in the admissions process. *See* Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. TIMES, Jan. 28, 2003, at A18.

Amici are not in a position to evaluate the propriety or efficacy of any particular admissions program. *Amici* recognize that any admissions program that considers race and ethnicity must be narrowly tailored to serve the compelling state interest in the attainment of a diverse student body. What is critical to *amici* is that the leading colleges, universities and graduate schools from which they recruit and hire their employees be diverse, and consist of the most qualified and talented diverse students as is possible. Universities historically have been responsive to the needs of business and other professions, developing an extraordinary talent pool upon which *amici* and others may draw. The interest in diversity in higher education is compelling, and it must accommodate reasonable, narrowly tailored measures that allow the admission of the most

qualified, diverse student body. *Cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'") (internal citation omitted); *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (same).

The experiences of *amici* in the 25 years since *Bakke* was decided confirm Justice Powell's holding that the pursuit of diversity in higher education is a compelling state interest. The reasons given by Justice Powell are just as valid today, if not more so. Institutions of higher learning must be allowed to prepare students to thrive in an increasingly diverse environment. The best way to do this is to ensure that students learn in an environment of diversity, including racial and cultural diversity. Students from diverse backgrounds bring to school "experiences, outlooks, and ideas that enrich the training of the student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314 (opinion of Powell, J.). Accordingly, institutions of higher learning should be able to use "competitive consideration of race and ethnic origin" in pursuit of a diverse student body. *Id.* at 320 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.). Such consideration is vital to the interests of American business, and it is necessary to ensure that members of all segments of our society receive the education and training they need to become the leaders of tomorrow.

CONCLUSION

For these reasons, the Court should find that the pursuit of diversity in higher education is a compelling state interest, and that the University of Michigan may take appropriate, narrowly tailored actions to admit a student body that, among other things, is racially and ethnically diverse.

Respectfully submitted,

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